Dato' Seri Anwar bin Ibrahim v Khairy Jamaluddin

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–23–44 OF 2008
SM KOMATHY JC
4 NOVEMBER 2013

Civil Procedure — Pleadings — Amendment of defence — Application to expand defence of justification in libel action — Application to amend defence made after case fixed for hearing — Whether there was meaning sought to be justified in proposed amendments — Whether purported particulars amounted to facts — Whether proposed plea of justification correct, proper and applicable — Whether delay in application justified — Rules of Court 2012 O 2 r 5

This was an application by the defendant under O 20 r 5 of the Rules of Court 2012 ('ROC') to amend his defence in a libel action, to expand on the defence of justification pleaded. The plaintiff filed a defamation action against the defendant, in respect of certain remarks made by the defendant during a political speech which the plaintiff contended were defamatory of him. In his defence, the defendant, inter alia, pleaded on the defences of justification, qualified privilege and estoppel. All preliminaries and pre-trial procedures have been completed and the case was fixed for hearing but the defendant then sought to amend his defence of justification to include 'lesser/lower defamatory meaning' and a plea of 'partial justification'. The plaintiff opposed the defendant's proposed amendments to the defence on the reasons that that the defendant failed to state the meaning he sought to justify in the proposed amendments; the purported particulars did not amount to facts which supported the allegation that the impugned words were true as required by O 78 r 3(2) of the ROC; the proposed plea of 'partial justification' was wrong, improper and inapplicable as the words which the plaintiff complained of referred to one charge and not several charges; and there was delay in making the application.

Held, dismissing the application with costs of RM5,000:

(1) The proposed amendments were ineffectual and immaterial since they did not disclose a defence of justification. There was consequently no basis to allow the application. The principles in decided cases made it abundantly clear that what was required for a plea of justification if the defendant contended the words bore a different meaning from that ascribed by the plaintiff, was to state with sufficient precision the meaning he contended, the provide particulars of facts that support that meaning. It would be imperative that the meaning be pleaded with clarity

so that a plaintiff would know what case he has to meet and what was the meaning which the defendant sought to attribute to the words complained of (see paras 17 & 52).

(2) The court would allow amendments up to the twelfth hour to permit the real dispute between the parties to be adjudicated upon. However, late applications made after a case had been set down for trial, unlike applications made prior to that, would require extreme close scrutiny and strong justification for there were wider considerations in play than mere presence or absence of prejudice. The court must be vigilant in identifying amendments which seek to raise the real question in controversy between the parties from those not made in good faith but made for the purpose of derailing the trial. It would be imperative and necessary that consideration be given to anxieties and the inconvenience caused to the other parties, the legitimate expectations of the other party of an early trial and the efficient conduct of litigation (see para 27).

(3) The plaintiff's complaint was justified. A perusal of the particulars in the proposed amended defence did not indicate with any clarity the alternative meaning that the defendant was relying on. It was true that particulars were set out, however, there was glaring omission to state explicitly what was the 'lesser/lower defamatory meaning' which the defendant sought to justify (see para 34).

(4) The court was unable to accept that the defendant's submission that the proposed amended defence were facts. The defendant's argument was unsustainable. The particulars pleaded of the proposed amended defence were not statement of facts but a narrative of his views and opinions about the opposition parties who were not parties to these proceedings (see para 40).

(5) The defendant's submission that he was entitled to amend his defence to raise the defence of partial justification even though the statement of claim referred to only one defamatory meaning, was untenable as the present proceedings involved only one charge. The plea of partial justification was bound to fail (see paras 45–46).

[Bahasa Malaysia summary

Ini adalah permohonan oleh defendan di bawah A 20 k 5 Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk meminda pembelaannya dalam tindakan libel, untuk menambah justifikasi pembelaan yang dipli. Plaintif telah memfailkan tindakan fitnah terhadap defendan, berkaitan kenyataan tertentu yang dibuat oleh defendan semasa ucapan politik yang mana plaintif berhujah adalah berunsur fitnah terhadapnya. Dalam pembelaannya, defendan, antara lain, mempli atas pembelaan justifikasi, perlindungan bersyarat dan estopel. Kesemua prosedur awalan dan sebelum perbicaraan telah selesai dan kes itu ditetapkan untuk perbicaraan tetapi defendan kemudian memohon untuk

meminda pembelaan justifikasinya untuk memasukkan 'lesser/lower defamatory meaning' dan pli 'partial justification'. Plaintif membantah cadangan pindaan-pindaan defendan kepada pembelaan itu kerana defendan gagal menyatakan maksud yang ingin dipohon olehnya untuk mewajarkan cadangan pindaan-pindaan tersebut; butiran-butiran yang dimaksudkan tidak membentuk fakta bagi menyokong dakwaan bahawa perkataan-perkataan yang dipersoalkan adalah benar sebagaimana dikehendaki oleh A 78 k 3(2) KKM; cadangan pli 'partial justification' adalah salah, tidak wajar dan tidak boleh terpakai kerana perkataan-perkataan yang diadukan oleh plaintif merujuk kepada satu pertuduhan dan bukan beberapa pertuduhan; dan terdapat kelewatan dalam membuat permohonan itu.

Diputuskan, menolak rayuan dengan kos sebanyak RM5,000:

(1) Cadangan pindaan-pindaan tidak berkesan dan tidak penting kerana tidak memberikan pembelaan justifikasi. Oleh itu tiada asas untuk membenarkan permohonan itu. Prinsip-prinsip dalam kes-kes yang telah diputuskan adalah jelas bahawa apa yang diperluaskan dalam pli justifikasi jika defendan berhujah perkataan-perkataan mempunyai maksud bebeza daripada yang diperkatakan oleh plaintif, adalah untuk menyatakan dengan ketepatan yang mencukupi maksud yang dihujahkannya, dengan mengemukakan butiran fakta yang menyokong maksud tersebut. Adalah imperatif bahawa maksud tersebut dipli dengan jelas agar plaintif mengetahui kes yang dihadapinya dan maksud yang diingini defendan untuk mengaitkan perkataan-perkataan yang diadukan itu (lihat perenggan 17 & 52).

(2) Mahkamah membenarkan pindaan-pindaan sehingga had masa untuk membenarkan pertikaian sebenar antara pihak-pihak diadili. Walau bagaimanapun, permohonan lewat yang dibuat selepas kes ditetapkan untuk perbicaraan, tidak seperti permohonan yang dibuat sebelum itu, memerlukan penelitian wajar dan justifikasi kukuh kerana terdapat pertimbangan lain daripada hanya kewujudan atau ketiadaan prejudis. Mahkamah perlu berjaga-jaga dalam mengenalpasti pindaan-pindaan yang akan menimbulkan persoalan sebenar yang dipertikaikan antara pihak-pihak daripada yang bukan dibuat dengan niat baik tetapi dibuat bagi tujuan menjejaskan perbicaraan. Adalah imperatif dan perlu agar diberikan pertimbangan terhadap kebimbangan dan kesulitan disebabkan kepada pihak lain, jangkaan sah pihak lain untuk perbicaraan awal dan pelaksanaan litigasi yang berkesan (lihat perenggan 27).

(3) Aduan plaintif telah berjustifikasi. Penelitian butir-butir dalam cadangan pembelaan yang dipinda tidak menunjukkan dengan jelas maksud alternatif yang dikatakan oleh defendan. Adalah benar bahawa butiran tersebut dinyatakan, bagaimanapun, terdapat peninggalan untuk

menyatakan dengan jelas apakah 'lesser/lower defamatory meaning' yang defendan pohon untuk dijustifikasikan (lihat perenggan 34).

(4) Mahkamah tidak dapat menerima hujah defendan bahawa cadangan pembelaan pindaan itu adalah fakta. Hujah defendan tidak boleh dikekalkan. Butiran yang dipli berhubung cadangan pembelaan yang dipinda bukan kenyataan fakta tetapi naratif pandangan dan pendapatnya tentang parti pembangkang yang bukan pihak dalam prosiding-prosiding tersebut (lihat perenggan 40).

(5) Hujah defendan bahawa dia berhak meminda pembelaannya untuk menimbulkan pembelaan sebahagian daripada justifikasi meskipun penyataan tuntutan merujuk hanya kepada maksud yang berunsur fitnah, tidak dapat dipertahankan kerana prosiding ini melibatkan hanya satu pertuduhan. Pli untuk sebahagian justifikasi akan gagal (lihat perenggan 45–46).]

Notes

For cases on amendment of defence, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 6259–6286.

Cases referred to

Alloy Consolidated Sdn Bhd & Anor v Dato' Dr Hj Adam bin Harun [2011] 5 MLJ 655; [2011] 5 CLJ 705, FC (distd)

Chase v News Group Newspapers [2002] EWCA Civ 1772, CA (refd)

Dato' Seri Anwar bin Ibrahim v Abdul Khalid @ Khalid Jafri bin Bakar Shah & Anor (W-02–741 of 2000) (unreported), CA (refd)

Gan Boon Kyee v Yap Hong Sin & Anor [1997] 2 MLJ 598; [1997] 3 CLJ 822, CA (refd)

HSB Bank Malaysia Bhd v Macquarie Technologies (M) Sdn Bhd [2004] 4 MLJ 398, CA (refd)

Jusoh v Ng Ah Sooi & Anor [1963] 1 MLJ 92 (refd)

Ketteman v Hansel Properties Ltd [1988] 1 All ER 38, HL (refd)

Lee Kuan Yew v Chin Vui Khen & Anor [1991] 3 MLJ 494, HC (refd)

Lucas-Box v News Group Newspapers Ltd [1986] 1 All ER 177, CA (refd)

Mirzan bin Mahathir v Star Papyrus Sdn Bhd [2000] 6 MLJ 29, HC (refd)

Polly Peck (Holdings) plc and others v Trelford and others [1986] 2 All ER 84, CA (folld)

Ponnusamy & Anor v Nathu Ram [1959] MLJ 228 (refd)

Prager v Times Newspaper Ltd [1988] 1 All ER 300, CA (refd)

Raphael Pura v Insas Bhd & Anor [2001] 1 MLJ 49, CA (refd)

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)

Legislation referred to

Defamation Act 1952 [UK] s 5
Defamation Act 1957 s 8
Evidence Act 1950 s 43
Rules of Court 2012 O 18 r 7, O 20 r 5, O 20 r 5(1), O 78 r 3(2)

Sulaiman Abdullah (Leela Jesuthasan with him) (Faiz & Co) for the plaintiff.
Jeffry John (Shafee & Co) for the defendant.

SM Komathy JC:

THE APPLICATION

[1] This is an application by the defendant under O 20 r 5 of the Rules of Court 2012 ('ROC') to amend his defence in this libel action, to expand on the defence of justification as pleaded therein. The application is supported by the defendant's affidavit affirmed on 9 September 2013 and is opposed by the plaintiff.

THE FACTS

[2] The factual matrix relevant to this application is briefly this. On 7 March 2008, the plaintiff filed this defamation action against the defendant, in respect of certain remarks made by the defendant during a political speech on 20 February 2008 at Lembah Pantai, Kuala Lumpur. During the speech, the defendant uttered the words *DAP main PAS dari kanan, PAS main DAP dari kiri, Anwar main dua-dua dari belakang*, which the plaintiff contends is defamatory of him. The defendant has, through his lawyer's letter dated 6 March 2008 in response to the plaintiff's letter of demand, admitted uttering the impugned words.

[3] At the material time in February 2008, the plaintiff was the advisor to Parti Keadilan Rakyat Malaysia, and the defendant, the Deputy Youth Chief of the Youth Wing of UMNO.

[4] The defendant filed his defence on 21 October 2010 relying, inter alia, on the defences of justification, qualified privilege and estoppel.

[5] An order precluding the defendant from defending the action was made on 13 August 2012 due to his failure to comply with an unless order made by the court during case management directions ('the preclusion order'). The defendant failed in his bid to set aside the preclusion order in the High Court but succeeded before the Court of Appeal on 21 June 2013.

[6] All preliminaries and pre-trial procedures have been completed and the case has been fixed for hearing for two days in November and two days in December 2013. In compliance with case management directions, the plaintiff has filed the bundle of pleadings, bundles of documents, statement of agreed facts, statement of issues to be tried, list of witnesses and case summary. Witness statements are due to be filed and exchanged on or before 14 November 2013.

[7] The defendant now, seeks to amend his defence of justification to include a 'lesser/lower defamatory meaning' and a plea of 'partial justification'.

THE PROPOSED AMENDMENTS

[8] In order to render comprehensible the arguments taken by the parties, it will be useful to reproduce the amendments that the defendant seeks to make to his defence of justification. They are contained in paras 11, 12 and 13 of the draft amended defence exhibited to his application. They read as follows:

> 11 Subject to and without prejudice to the matters pleaded in paragraph 10 above the defendant pleads that the impugned words carry a lesser/lower defamatory meaning which are as follows:
>
> a) The defendant uttered the impugned words as an analogy to the true nature of the alliance formed by the opposition parties prior to the general election. Without prejudice to the matters pleaded in paragraph 4 above, the defendant states that the words were uttered by the defendant during the defendant's speech which was delivered in the course of the Barisan Nasional's campaign in the 12th General Election held in Lembah Pantai Kuala Lumpur on or about 20 February 2008;
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> b) The impugned words were targeted to explain how the political parties known as the Democratic Action Party ('DAP'), Pan Malaysian Islamic Party ('PAS') and the Peoples Justice Party ('PKR') which had at that time grouped together to form the informal political coalition between themselves known as 'the Pakatan Rakyat' would interact between each other;
>
> c) The words were uttered by the defendant to explain to those present at the gathering that DAP, PAS and PKR had chosen to form the informal coalition with the aim of a common political agenda for the purposes of contesting an election to mutually benefit themselves. The thrust of the impugned words was targeted to explain the position or defendant's opinion of this alliance and that it was not a true alliance simply because in actual fact there was no true synergy/cooperation between DAP, PAS and PKR as the political leaders of the respective parties were in the habit of playing each other out to further their respective political interests/agendas separately and that this was the norm adopted by opposition parties against the ruling coalition party at the time;

d) That the plaintiff's prior expressions or political promises were doubtful and inconsistent with even the possibility of betrayal of his own political allies; and

e) The words were also uttered by the defendant to demonstrate that the Pakatan Rakyat coalition did not have the cooperation that was enjoyed by the political parties under the umbrella of the Barisan Nasional coalition government.

12 In so far as the words complained of allege that the plaintiff was defamed in the meaning pleaded in paragraphs 5 (i) to (iii) and paragraph 6 (i) to (iii) in the statement of claim, the defendant contends that the decision of the Federal Court pleaded in paragraph 10 (i) above is relevant on the issue of the plaintiff's homosexual conduct and in so far that they are the subject matter of comments by the courts in the land they are true in substance and in fact.

13 The defendant will, if necessary, rely on section 8 of the Defamation Act 1957.

ARGUMENTS OF PARTIES

[9] The defendant conceded that the application is made late in the day, but contended that under O 20 r 5(1) of the ROC, an application to amend the defence can be made at any stage of the proceedings for the purpose of determining the real question in controversy between the parties. In support of this submission, he invoked the leading decision of the Federal Court in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213. Mohamed Azmi FJ (at 214) said:

> The general principle is that the court will allow such amendment as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result (a) whether the application was bone fide (b) whether the prejudice caused to the other side can be compensated by costs and (c) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

[10] The defendant further contended that he has a good explanation for the delay. It is said that the application is not intended to derail or delay the trial.

[11] The defendant also contended that he was entitled in a defamation action to place before this court his version of what the words allegedly uttered by him meant which is different from the meaning that the plaintiff in this case has ascribed to them. The defendant, through the amendment, intends to prove at the time of the trial of this action that the defendant's version is true. In this connection, strong reliance is placed on the decision of the English Court of Appeal in *Prager v Times Newspaper Ltd* [1988] 1 All ER 300.

[12] The plaintiff opposed the defendant's proposed amendments to the defence, inter alia, on the following reasons:

(a) The defendant has failed to state the meaning he seeks to justify in the proposed amendments;

(b) The purported particulars in para 11(i) to (v) do not amount to facts which support the allegation that the impugned words are true as required by O 78 r 3(2) of the ROC;

(c) The proposed plea of 'Partial Justification' in para 12 is wrong, improper and inapplicable as the words which the plaintiff complaints of refer only to one charge and not several charges; and

(d) The delay in making the application.

[13] Before confronting these submissions, I will examine the relevant law on the defence of justification in a defamation action.

THE LAW

Principles governing the defence of justification

[14] The *Lucas Box* principle was formulated by the English Court of Appeal in the well known case of *Lucas-Box v News Group Newspapers Ltd* [1986] 1 All ER 177. It was held that in a defamation action, a defendant who does not agree with the meaning of the words about which the plaintiff makes complaint, is entitled to give an alternative meaning and give particulars to justify that meaning. This is known as 'the *Lucas-Box*' meaning. Ackner LJ explained (at 181) that:

> It is axiomatic that the function of pleadings is to define the issues between the parties, so that both the plaintiff and the defendant know what is the other side's case and thus everyone, counsel, judge and jury, are able to focus on the real nature of the dispute. Although to some it may seem a startling observation, we can see no reason why libel litigation should be immune from ordinary pleading rules. During the last dozen or so years, as a result of the views expressed by Lord Hodson and Lord Devlin in *Lewis v Daily Telegraph Ltd* [1963] 2 All ER 151 at 166; 171–172, [1964] AC 234 at 273, 281–282, and adopted by this court in *Allsop v Church of England Newspaper Ltd* [1972] 2 All ER 26 at 28–29, [1972] 2 QB 161 at 166–167 and *DDSA Pharmaceuticals Ltd v Times Newspapers Ltd* [1972] 3 All ER 417; [1973] QB 21. it has become the settled practice for a plaintiff, where the meaning of the words complained of is not clear and explicit, to plead the meanings which he says the words bear. This enables the defendant to know what case he has to meet and to prepare his defence accordingly. Such a practice is, further, of considerable assistance to the court since it thus clearly provides to the trial judge the meanings on which he must rule in deciding whether the words published are capable of being so

understood. The general question which has arisen in this case is the reverse of the coin, namely whether a defendant who pleads justification must state the meaning which he seeks to justify.

And Ackner LJ continued at 183:

> However, we would go even further and say that, whatever may have been the practice to date, in future a defendant who is relying on a plea of justification must make it clear to the plaintiff what is the case which he is seeking to set up. The particulars themselves may make this quite clear, but if they are ambiguous then the situation must be made unequivocal.

[15] In a later case, *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772 Lord Justice Brooke referred to the principle in *Lucas-Box* and said at para 37:

> Under modern libel practice a defendant must set out in his/her statement of case the defamatory meaning he/she seeks to prove to be essentially or substantially true. This is now known as the *Lucas-Box* meaning, following the case of *Lucas Box v News Group Ltd* [1986] 1 WLR 147. By this means the claimant (and the court) will know unequivocally what the defendant is seeking to justify. In the *Lucas-Box* case itself Ackner LJ said at p 153G that if the particulars originally given by a defendant of a *Lucas-Box* meaning are not clear then the situation must be made unequivocal. The defendant must then give proper particulars of the facts on which he/she relies to justify that meaning.

[16] The *Lucas Box* principle was followed and applied by Kamalanathan Ratnam J in *Mirzan bin Mahathir v Star Papyrus Sdn Bhd* [2000] 6 MLJ 29. His Lordship said (at 37 and 38):

> There is a clear duty when relying upon a plea of justification to inform the plaintiff precisely the meanings the defendant intends to justify (see *Lucas-Box*). This principle was adopted by a later Court of Appeal in *Viscount De L'Isle v Times Newspapers Ltd* [1987] 3 All ER 499 which acknowledged that this principle as set out in *Lucas-Box* 'may have broken new ground'. More amplification was given to this principle by the decision of yet another Court of Appeal in *Morrell v International Thomson Publishing Ltd & Ors* [1989] 3 All ER 733. May LJ said at pp 737–738 as follows:
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> > … In any event I think the position now is that a defendant who pleads justification must do so in such a way as quite clearly, without circumlocution or obfuscation, to inform the plaintiff and the court of precisely what meaning or meanings the defendant may seek to justify.
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> Based on all these decisions which I accept, it is my conclusion that a defendant setting up a plea of justification must plead his case with sufficient particularity, without circumlocution or obfuscation, so as to enable the plaintiff to know the

possible defamatory meaning of the words complained of, which the defendant is seeking to justify. In other words, he must state clearly to the plaintiff what is the case that he is seeking to set up.

[17] The principle in these cases, with which I respectfully agree, make it abundantly clear that what is required for a plea of justification if the defendant contends the words bear a different meaning from that ascribed by the plaintiff, is to state with sufficient precision the meaning he contends, then provide particulars of facts that support that meaning. It is imperative that the meaning be pleaded with clarity so that a plaintiff knows what case he has to meet and what is the meaning which the defendant seeks to attribute to the words complained of.

DISCUSSION

[18] As mentioned earlier in my judgment, the plaintiff opposed the application on a number of grounds including lateness and the absence of any prospect of success for the proposed amendments in paras 11, 12 and 13. I shall say something about each of these contentions in turn, starting with lateness.

LATENESS

[19] Order 20 r 5(1) of the ROC provides:

Subject to Order 15, rr 6, 6A, 7, and 8 and the following provision of this rule, *the court may at any stage of the proceedings allow the Plaintiff to amend his writ, or any party to amend his pleading*, on such terms as to costs or otherwise as may be just and in such a manner, if any, as it may direct

[20] The plaintiff emphasised that the original defence was filed on 8 October 2010. And, in early December 2011, the defendant had informed the court that an application to amend the defence would be filed. There has been a delay of three years in making the application and the delay is unexplained. It was further pointed out that the Court of Appeal had dissolved the preclusion order on 21 June 2013, and the defendant failed to make this application promptly, but instead took some three months.

[21] The plaintiff accepted that O 20 r 5(1) allows a party to amend his pleading at any stage of the proceedings. But, contended strongly that there is no special rule that as a matter of right an amendment should be allowed at almost any time provided the other parties could be compensated in costs. In support of this submission, the court was referred to the following passage in *Gatley on Libel and Slander* (11th Ed) at p 1029;

> The court has shown itself less willing, however to grant a defendant permission to amend his defence where the application is made late in the day, either at, or close to the trial; in particular, when a defendant seeks to introduce or expand a plea of justification at a late stage, his conduct will be closely inquired into and the court will expect him to have shown due diligence in making his inquiries and investigations … It has been held that where the delay has been due to the defendant's own default in some respect, that circumstance should be taken into consideration by the judge as part of the matters to be weighed in deciding whether or not to allow an amendment. The mere fact the delay may be capable of being compensated in money is not conclusive of the question whether the amendment should or should not be allowed.

[22] The plaintiff also relied on the observation of Haidar JCA in *Raphael Pura v Insas Bhd & Anor* [2001] 1 MLJ 49, (at 55):

> An application for amendment of a writ or pleading is not as a matter of right of a party but is left to the judicial discretion of the court depending on the circumstances of each case.

[23] In reliance on these authorities, the plaintiff urged the court not to exercise its discretion in favour of the defendant who has been dilatory and inactive in the pursuit of his defence. The plaintiff emphasised that the application was filed some three years after the original defence was filed on 8 October 2010. It is pointed out that in early December 2011, the defendant had informed the court that an application to amend the defence would be filed, but did not do so. It was further pointed out that the defendant did not make this application promptly after the preclusion order had been dissolved by the Court of Appeal on 21 June 2013. He took some three months. The plaintiff also alleged that he will suffer prejudice and great hardship if the amendment is allowed, as all the necessary bundles of documents have been in court in the expectation that the trial will proceed on the dates given by the court.

[24] In answer, the defendant contended that delay per se is not a ground for dismissing an application to amend a defence. It is said that any prejudice or hardship suffered by the plaintiff as a result of the amendment, can be compensated by an order of costs. In support of his submission, he cited and relied on a passage from the judgment of the Federal Court in the case of *Alloy Consolidated Sdn Bhd & Anor v Dato' Dr Hj Adam bin Harun* [2011] 5 MLJ 655; [2011] 5 CLJ 705, at para 25:

> Generally, the court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just or all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

> The rule permits amendments at any stage and it does not matter whether the original omission arose from negligence or carelessness but such amendments are allowed only where they occasion no injury and cause no injustice to the opposite party or where they can be sufficiently compensated by costs or other terms imposed by the court.

[25] The defendant explained that the delay in the making of the present application was as a result of the preclusion order. The preclusion order had the effect of preventing his participation in the proceedings in the High Court until it had been dissolved by the Court of Appeal.

[26] I reject the bold submission made by the defendant that the decision in *Alloy Consolidated* is authority for the proposition that it is almost a matter of right that an amendment should be allowed at almost any time provided the other parties could, in financial terms, be compensated in costs. In my view, the Federal Court in *Alloy Consolidated* merely reiterated the broad general rule as articulated in *Yamaha Motors*. It did not deal specifically with the considerations that must be taken into account when a late application is made after a case is set down for trial.

[27] It is clear from the authorities that the court will allow amendments up to the twelfth hour to permit the real dispute between the parties to be adjudicated upon. However, in my view, late applications made after a case is set down for trial, unlike applications made prior to that, require extremely close scrutiny, and strong justification, for there are wider considerations in play than mere presence or absence of prejudice. The court must be vigilant in identifying amendments which seek to raise 'the real question in controversy between the parties' from those not made in good faith, but made for the purpose of derailing the trial. It is imperative and necessary that consideration be given to anxieties and the inconvenience caused to the other parties, the legitimate expectations of the other party of an early trial and the efficient conduct of litigation.

[28] In this connection, it would be pertinent to refer to a passage from the decision of the House of Lords in *Ketteman v Hansel Properties Ltd* [1988] 1 All ER 38. Lord Griffiths who delivered the principal speech for the majority said (at p 62):

Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. *There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings*.

(Emphasis added.)

[29] The same principle was echoed by Gopal Sri Ram JCA in *Gan Boon Kyee v Yap Hong Sin & Anor* [1997] 2 MLJ 598; [1997] 3 CLJ 822 where he said, 'It is axiomatic that the law assists the vigilant and not the indolent'.

[30] Turning to the present case, I accept the defendant's explanation that the delay in the filing of the application was not to derail the trial but had been occasioned by the preclusion order made against him. As the lateness in making the application has been reasonably explained by the defendant. I therefore now proceed to consider the application on the merits.

WHETHER PROPOSED PARTICULARS SHOW ALTERNATIVE MEANING

[31] The parties were in agreement that in a defamation action, by operation of the *Lucas Box* principle, a plaintiff is not entitled to restrict the defendant to seeking to justify the meaning or meanings selected by the plaintiff. A defendant is entitled to give *Lucas Box* meaning or meanings from that or those alleged by the plaintiff.

[32] The plaintiff contended that contrary to the *Lucas Box* principle, the defendant has failed to state in the proposed particulars of justification what is the alternative or *Lucas Box* meaning that the defendant intends to rely on. It is said that the plaintiff would be gravely prejudiced if he needs to go for trial without being put on notice as to what is the defendant's *Lucas Box* meaning.

[33] In response, the defendant submitted that the particulars of justification furnished in para 11 of the proposed amended defence include the meaning which the defendant ascribes to the said words that are complained of which is the subject matter to this action.

[34] The question arises, has the defendant in his proposed amended defence given an alternative meaning to the words that the plaintiff complains of. In my view, the plaintiffs complaint is justified. A perusal of the particulars in the

proposed amended defence, does not indicate with any clarity the alternative meaning that the defendant is relying on. In para 11 of the proposed amended defence, the defendant pleads that 'the impugned words carry a lesser/lower defamatory meaning which are as follows:' It is true that particulars are set out, however, there is a glaring omission to state explicitly what is the lesser/lower defamatory meaning that the defendant seeks to justify. When the defendant's counsel was asked to explain what is the alternative meaning that the defendant intended to rely upon at the trial, I did not find his answer helpful either.

[35] The authorities illustrate that it is of utmost importance that the *Lucas-Box* particulars should set out the meaning expressly and not leave it to the reader to do his best to deduce and extract from a series of particulars what must be the meaning or meanings which the defendant is apparently seeking to justify. The proposed particulars in this application are manifestly unsatisfactory.

NO PARTICULARS OF FACTS GIVEN

[36] Order 78 r 3(2) of the ROC provide:

> Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consists of fact, they are true in substance and in fact, … he must give particulars stating which of the words complained of he alleges are statement of fact and of the facts and matters he relies on in support of the allegation that the words are true.

[37] The plaintiff contended that the particulars of justification in support of the *Lucas Box* meaning in the proposed amended defence has failed to comply with O 78 r 3(2). It is said that the proposed particulars that the defendant seeks to plead do not deal with facts but state the defendant's opinion and view about the opposition parties. It is contended that pursuant to O 78 r 3(2), it is incumbent upon a defendant when relying on the defence of justification to plead particulars of facts that are sought to be justified.

[38] In support of his contention, the plaintiff drew my attention to the following passage at p 500 from the judgment of Siti Norma Yaakob J in the case of *Lee Kuan Yew v Chin Vui Khen & Anor* [1991] 3 MLJ 494. It reads:

> When the words complained of allude to general charges, a defendant who pleads justification must state some specific acts and instances of misconduct imputed to the plaintiff supported by precise particulars of fact as tending to show the truth of such misconduct.
>
> In this case, the particulars supplied by the defendant are too general as to embarrass the plaintiff as he does not know the precise acts he is alleged to have done which justify the charges against him.

Her Ladyship then continued thus at the same page:

> In this case, since we are concerned with the matter of particulars to be supplied, such particulars must relate to the facts and not evidence … the function of particulars is to ensure that the litigation between the parties, particularly the trial should be conducted fairly, without surprises and to reduce costs; and this can only be achieved when the facts on which the defendants rely to justify the words complained of are true and fair comment, are forthcoming from the defendant, so that all issues can be predetermined before trial.

[39] The defendant did not, in my view correctly, seek to dispute this proposition but submitted that the proposed particulars stated in the proposed amended defence were statement of facts.

[40] Having perused the particulars in the proposed amended defence, I am unable to accept the defendant's submission that these are facts. The particulars pleaded in para 11(f) to (v) of the proposed amended defence are not statement of facts but a narrative of the defendant's views and opinions about the opposition parties.It is important to note that the opposition parties are not parties to these proceedings. I therefore find the defendant's argument unsustainable.

[41] It is also relevant to note in this connection that O 18 r 7 of the ROC allows only facts to be pleaded. This provision reads:

> Subject to the provisions of this rule and rr 10, 11 and 12, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for hi claim or defence, as the case may be, but not of evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.

IMPROPER PLEA OF PARTIAL JUSTIFICATION

[42] It is common ground that by paras 12 and 13 of the proposed amended defence, the defendant is seeking to introduce an additional plea of partial justification. It is therefore necessary to examine s 8 of the Defamation Act 1957 which deals with this defence. It reads:

> In an action for libel or slander in respect of words containing 2 or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiffs reputation having regard to the truth of the remaining charges.

[43] The English Court of Appeal in *Polly Peck (Holdings) plc & others v*

Trelford & others [1986] 2 All ER 84 when dealing with s 5 of the English Defamation Act which is pari materia with our s 8, said:

> Section 5 of the 1952 Act applied only where the specific words of which the plaintiff complained contained two or more distinct charges. Since neither the plaintiffs nor the defendants contended that the words of which the plaintiff complained contained two or more distinct charges, s 5 did not apply, and the fact that the article as a whole contained more than one charge was irrelevant.

[44] It is manifest from s 8 and the decision in *Polly Peck* that a defendant may invoke this defence only in cases where a plaintiff's claim raises expressly or by implication several distinct defamatory meanings. This is an essential pre-requisite that must be evident from the statement of claim. The defence of partial justification permits a defendant to justify any one of the defamatory meanings alleged by a plaintiff.

[45] The plaintiff contended that the defence of partial justification that the defendant seeks to raise by the proposed amendment is misconceived. It is said that it is crucial to note that in the present case, the plaintiff is only complaining of one defamatory meaning of the statement which is sued upon. The statement of claim does not allude to two or more different defamatory statements. On the other hand, the defendant maintained that although the statement of claim referred to only one defamatory meaning, he was nevertheless still entitled to amend his defence to raise this defence. No authorities were cited in support of the position taken.

[46] In my view, the defendant's submission is untenable in view of the principle clearly stated in s 8 and the decision in *Polly Peck*. By virtue of s 8, as the present proceedings involve only one charge, a plea of partial justification is bound to fail.

[47] The second point made by the plaintiff relating to this defence, concerns the reference in para 12 of the proposed amended defence, to the Federal Court decision on the plaintiff's alleged homosexual conduct. The plaintiff contended that this is impermissible and is contrary to the clear terms of s 43 of the Evidence Act 1950 which provides:

> Judgments, orders, decrees other than those mentioned in ss 40, 41 and 42 are irrelevant unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act.

[48] The plaintiff relied on the case of *Jusoh v Ng Ah Sooi & Anor* [1963] MLJ 92 and the decision of the Court of Appeal in *Dato' Seri Anwar bin Ibrahim v Abdul Khalid @ Khalid Jafri bin Bakar Shah & Anor* (W-02–741 of 2000)

(unreported) to illustrate his point on the express prohibition contained in s 43 of the Evidence Act. In *Dato Seri Anwar*'s case, the defendants in that case, sought to amend the defence to plead the plaintiff's conviction. The application was allowed by the High Court, but on appeal, the Court of Appeal set aside the order on the ground that this was not permissible.

[49] The defendant's response to this submission is that the provision in question does not prohibit him from relying on it.

[50] In my view, there is force in the submission made by the plaintiff that the meaning of s 43 of the Evidence Act is clear and unambiguous and this is supported by the decision of the Court of Appeal. Thus, I accept the plaintiff's submission that s 43 expressly precludes the defendant from relying on the judgment of the Federal Court in support of his defence.

MATERIALITY OF AMENDMENTS

[51] In the case of *Ponnusamy & Anor v Nathu Ram* [1959] MLJ 228, Good J enunciated the wellknown principle governing amendments at p 229:

> … But there is an abundance of authority for the proposition that in dealing with an application to amend the pleadings the court should consider the materiality and effectiveness of the amendment, and it is a well establish practice not to allow an amendment where it appears that such an amendment would be useless.The court should look at the probable consequences of the amendment, and if the amendment will be ineffectual then it ought not be allowed to be made.

And a little later, continued:

> If a party is precluded from setting up a certain plea by reason of the fact that he is not permitted by the law of evidence to give evidence in support of it, he should not be permitted to include that plea in his pleadings.

[52] This statement of law expressed in the above case has been cited and approved by the Court of Appeal in *HSB Bank Malaysia Bhd v Macquarie Technologies (M) Sdn Bhd* [2004] 4 MLJ 398. As the proposed amendments in the present case are ineffectual and immaterial as they do not disclose a defence of justification, there is consequently no basis to allow the application. It is trite that the court does not make orders in vain. The court does not allow

applications which were manifestly incapable of succeeding at the trial.

CONCLUSION

[53] For the reasons given, I dismissed the application with costs of RM5,000 to the plaintiff.

Application dismissed with costs of RM5,000.

Reported by Afiq Mohamad Noor